

United States
Circuit Court of Appeals
For the Ninth Circuit.

DE MARTINI MOTOR TRUCK COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Apellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

FILED

MAY 25 1923

U. S. DISTRICT COURT

United States
Circuit Court of Appeals
For the Ninth Circuit.

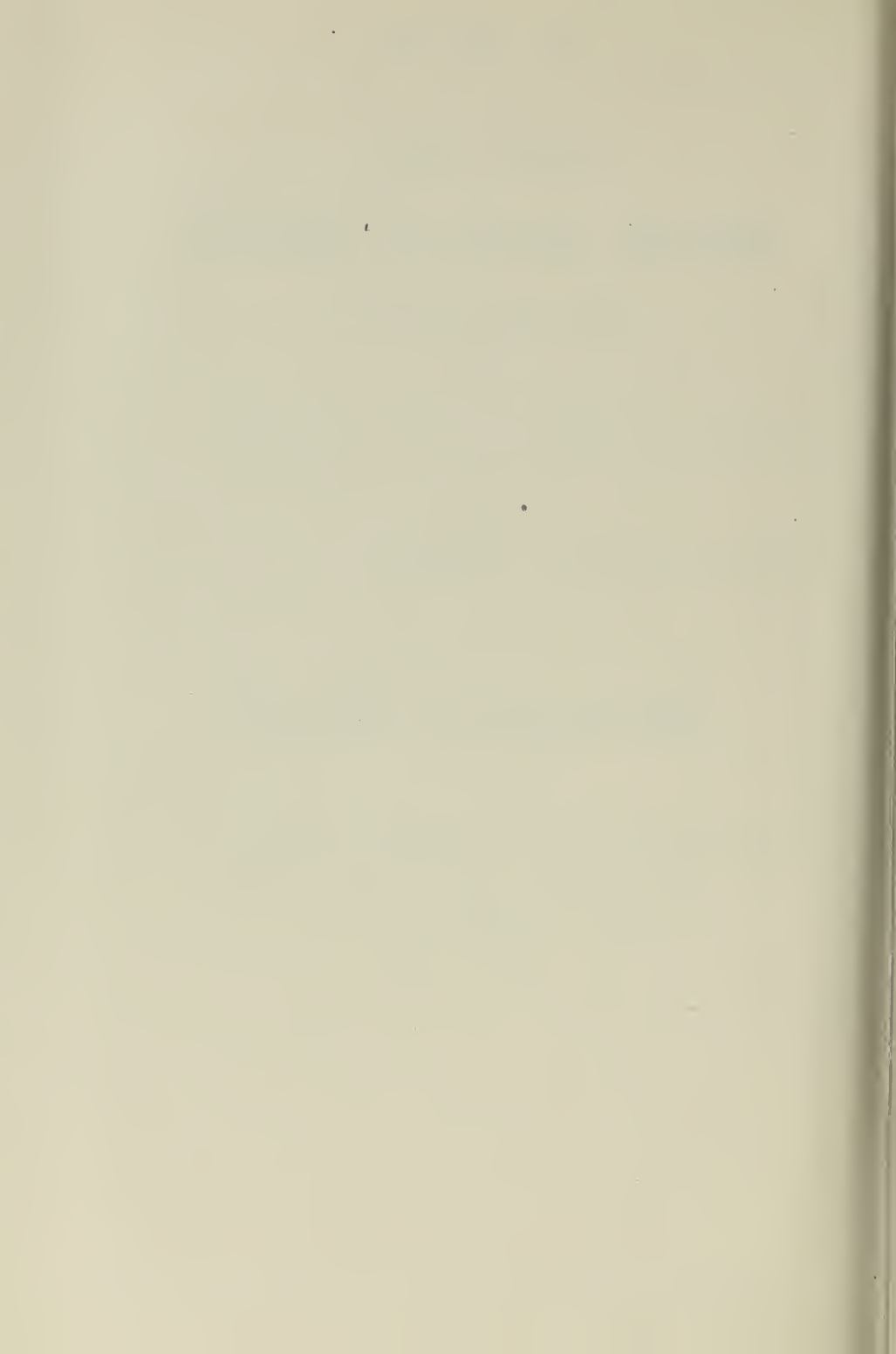
DE MARTINI MOTOR TRUCK COMPANY,
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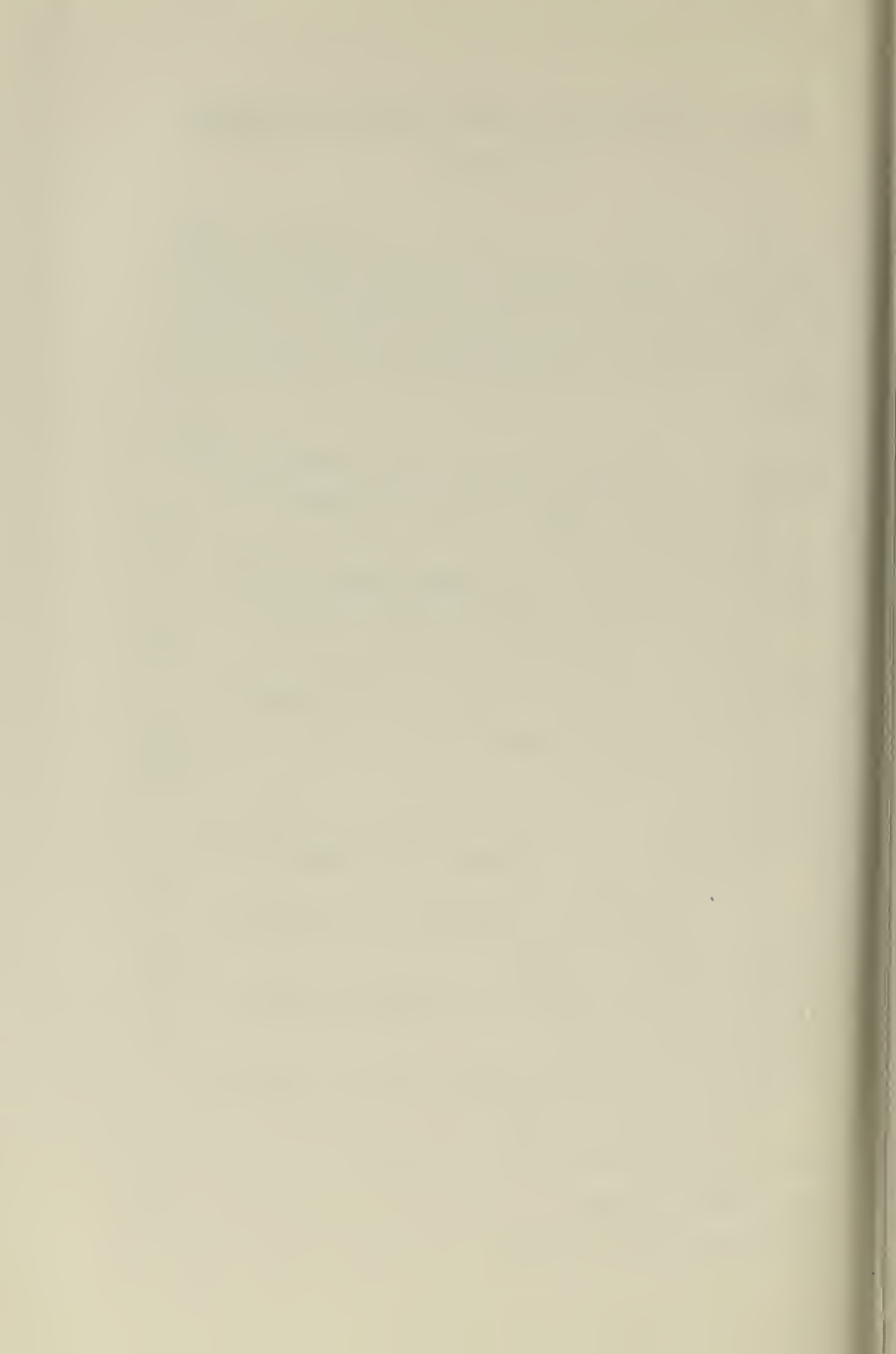
Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

P. R. LUND, Esq., Attorney for Appellant,
San Francisco, Calif.

UNITED STATES ATTORNEY, Attorney for
Appellee, San Francisco, Calif.

In the United States District Court for the North-
ern District of California.

No. 12,188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI,
Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You are hereby requested to make up the record on appeal in the above-entitled cause including therein the following documents on file in your office:

1. Affidavit and petition of De Martini Motor Truck Company for return of 2-ton truck together with Exhibit "A" attached thereto.

2. The answer of the United States of America to said petition together with any exhibits which may be thereto attached.

3. The order of Court made and entered April 14th, 1923, denying the application of said De Martini Motor Truck Company.

4. The petition for appeal.
5. Specification of errors.
6. Order allowing appeal.
7. Undertaking on appeal.
8. Supersedeas order.
9. Citation on appeal.

P. R. LUND,

Solicitor and Counsel for ———.

[Endorsed]: Filed at 10 o'clock and 15 min.
A. M., Apr. 26, 1923. Walter B. Maling, Clerk.
By C. M. Taylor, Deputy Clerk. [1*]

In the United States District Court for the North-
ern District of California, Division One.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

**Affidavit of Guido Braccini and Petition of De Mar-
tini Motor Truck Company (for Return of
Truck).**

State of California,

City and County of San Francisco,—ss.

Guido Braccini, being first duly sworn, deposes
and says:

*Page-number appearing at foot of page of original certified Trans-
cript of Record.

That at all of the times herein mentioned De Martini Motor Truck Company was and now is engaged in the manufacture and sale of motor trucks in the City and County of San Francisco and at all of said times his affiant was and now is the sales-manager of the said De Martini Motor Truck Company and as such sales-manager is fully familiar with the facts below stated and hence makes this affidavit on behalf of said De Martini Motor Truck Company.

That on or about the 4th day of December, 1920, De Martini Motor Truck Company sold and Giuseppe Capacioli purchased from said De Martini Motor Truck Company one 2-ton 1920 Model Truck #192111, Motor No. IU-80566 Motor Truck.

That said sale was evidenced by a certain agreement in writing executed on the 4th day of December, 1920, and that a true copy of said agreement is annexed to this affidavit and [2] made a part thereof for all purposes.

That the purchase price agreed upon between the buyer and the seller for the said motor truck was Thirty-one Hundred and 00/100 (\$3100.00) Dollars, to that Nine Hundred and 00/100 (\$900.00) Dollars was paid at the time of delivery of said truck and subsequently thereto monthly payments upon the balance due, were made so that at this time there remains due from the said Giuseppe Capacioli to De Martini Motor Truck Company on account of the said balance of said purchase price the sum of Six Hundred Thirty-one and 79/100 (\$631.79) Dollars.

That under the terms of said contract the legal title to said motor truck remains in the De Martini Motor Truck Company until the full purchase price of Thirty-one Hundred and 00/100 (\$3100.00) Dollars has been paid.

That affiant is informed and believes that the said Guiseppe Capacioli, the defendant herein, has no property or assets of record in the City and County of San Francisco upon which an execution could be levied.

That one of the provisions of said contract of sale is that the purchaser shall not at any time permit the said motor truck to be removed from his possession or to permit any adverse claim of any character against the same, and not to operate the same contrary to law.

That affiant is informed and believes and on such information and belief states that in the month of October, 1922, in the City and County of San Francisco, State of California, the said defendant, Guiseppe Capacioli, was arrested and the said 2-ton truck was seized for the alleged unlawful transportation of intoxicating liquor in violation of the so-called National Prohibition Act and that the said 2-ton truck is now in the possession and custody of the United States Prohibition Enforcement [3] Officer at San Francisco, California, and that said 2-ton truck is subjected to the further order of this Court.

Affiant further states that at the time said 2-ton truck was entrusted to the care and custody of Guiseppe Capacioli, defendant herein, this affiant had

no knowledge or information nor has said affiant had any notice or information or suspected that said Guiseppe Capacioli since said time intended to use or was using said 2-ton truck in unlawfully transporting intoxicating liquor.

GUIDO BRACCINI.

Subscribed and sworn to before me this 23d day of December, 1922.

[Seal]

THOMAS S. BURNES,

Notary Public in and for the City and County of San Francisco, State of California.

**Petition of De Martini Motor Truck Company for
Return of Truck.**

Wherefore your petitioner, De Martini Motor Truck Company, prays for an order of this Court restoring and surrendering to it the said 2-ton truck in accordance with the provisions of said contract of sale hereto annexed, because of the breach by the purchaser of one of the essential conditions of said contract; or if the said 2-ton truck is not so restored and surrendered to your petitioner but the same be sold in the manner provided by law that in that event, the amount due your petitioner be paid in full out of the moneys realized from said sale, unless the amount paid for said 2-ton truck at the time of said sale be less than the amount of the lien of your petitioner, Six Hundred Thirty-one and 79/100 (\$631.79) Dollars, in which event your

petitioner prays that the said 2-ton truck be returned to your [4] petitioner.

P. R. LUND,
Attorney for Petitioner,
No. 444 California Street,
San Francisco, California.

[Endorsed]: Filed Dec. 27, 1922. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[5]

THIS AGREEMENT made this 4th day of SEPTEMBER, 1920 by and between DE MARTINI MOTOR TRUCK Co., Inc., 425 Pacific Street, hereinafter called the seller, and

GIUSEPPE CAPACCIOLI hereinafter called the purchaser, WITNESSETH: 1. That said seller hereby agrees to sell and transfer to said purchaser, and said purchaser hereby agrees to purchase from said seller, the following described Automobile:

One (1) DE-MARTINI Make TRUCK state tonnage

Model and year 1920 Serial No. 19211 Motor No. FU-90566

Here describe fully any special attachments and/or equipment complete with all standard attachments and equipment under the terms and conditions hereof, for the total purchase price of THIRTY-ONE HUNDRED (\$3100.00) Dollars, payable as follows:

<u>ONE HUNDRED</u>	of which is hereby acknowledged, and	(\$ <u>1000.00</u>)	Dollars upon signing this agreement, the receipt of which is hereby acknowledged, and
1. <u>100.00</u>	Due <u>Oct. 4 1920</u>	<u>11.66.00</u>	due <u>Aug. 4 1921</u>
2. <u>66.00</u>	" <u>Nov. 4 1920</u>	<u>12.66.00</u>	" <u>Sept. 4 1921</u>
3. <u>66.00</u>	" <u>Dec. 4 1920</u>	<u>13.66.00</u>	" <u>Oct. 4 1921</u>
4. <u>66.00</u>	" <u>Jan. 4 1921</u>	<u>14.66.00</u>	" <u>Nov. 4 1921</u>
5. <u>66.00</u>	" <u>Feb. 4 1921</u>	<u>15.66.00</u>	" <u>Dec. 4 1921</u>
6. <u>66.00</u>	" <u>Mar. 4 1921</u>	<u>16.66.00</u>	" <u>Jan. 4 1922</u>
7. <u>66.00</u>	" <u>Apr. 4 1921</u>	<u>17.66.00</u>	" <u>Feb. 4 1922</u>
8. <u>66.00</u>	" <u>May 4 1921</u>	<u>18.66.00</u>	" <u>Mar. 4 1922</u>
9. <u>66.00</u>	" <u>June 4 1921</u>	<u>19.66.00</u>	" <u>Apr. 4 1922</u>
10. <u>66.00</u>	with interest on the foregoing deferred payments, from the date hereof until paid, at the rate of eight per cent per annum payable on each payment of principal when due. Said purchaser hereby expressly agrees to pay said deferred payments and interest in the manner aforesaid at the office of the seller or his assigns.	<u>20.66.00</u>	" <u>May 4 1922</u>
		<u>21.66.00</u>	due <u>June 4, 1922</u>
		<u>22.66.00</u>	" <u>July 4, 1922</u>
		<u>23.66.00</u>	" <u>Aug. 4, 1922</u>
		<u>24.66.00</u>	" <u>Sept. 4, 1922</u>
		<u>25.66.00</u>	" <u>Oct. 4, 1922</u>
		<u>26.66.00</u>	" <u>Nov. 4, 1922</u>
		<u>27.484.00</u>	" <u>Dec. 4, 1922</u>

Said purchaser hereby acknowledges receipt from said seller of said automobile in good condition and agrees not to sell, attempt to sell or otherwise dispose of the same, nor to take the same out of the State of attached, nor permit the same to be removed from his possession, nor permit the same to be used for storage, repairs or otherwise, and that he will pay all taxes and assessments of every character levied or assessed against said automobile.

Said purchaser agrees to keep said automobile insured against loss by fire, theft and transportation and at his own expense for an amount not less than the aggregate sum of said original deferred payments, so long as any of said payments shall remain unpaid; said insurance shall be placed in an insurance company or companies designated by said seller and shall be payable to said seller and said purchaser as their interests may appear, and said policy or policies shall be held by said seller until this agreement is fully performed. Should said seller secure said insurance and pay premiums therefor or incur liability for the same, said purchaser shall forthwith repay said seller the amount expended therefor, with interest thereon at the rate of eight per cent per annum from date of payment.

Should said automobile suffer any loss, damage or injury from any cause whatsoever, such loss, damage or injury shall not relieve said purchaser from the obligation to purchase and pay for the same, according to the terms of this agreement.

It is agreed that should any repairs be done by the DE MARTINI MOTOR TRUCK Co. Inc. on this automobile before the final payment is made, or any supplies of any kind be furnished for the same, the purchase price of said automobile will, at the option of the DE MARTINI MOTOR TRUCK CO. Inc., and without notice, be increased by the amounts of such bills, which shall be due at once as additional payments to those hereinbefore specified; this security being additional to right of lien for repairs and parts and not in lieu of or a waiver of such lien.

The purchaser agrees that any equipment, repairs, tires or accessories of any character placed upon said automobile during the continuance of this agreement, shall be and become a component part thereof, and that the title thereto shall immediately become vested in said seller, and be included under the terms of this agreement.

Said purchaser hereby expressly agrees that he will not use or permit said automobile to be used for hire during the existence of this agreement and that he will during said period use, operate and control the same in accordance with all statutes, laws, ordinances and regulations relating to the use, operation and control of automobiles.

It is distinctly understood and agreed that the title to said automobiles shall remain in said seller until all the payments herein provided for are made and all of the conditions and terms hereof fully complied with by said purchaser, whereupon said seller shall make, execute and deliver to said purchaser a bill of sale of said automobile.

It is agreed that in the event the seller shall assign and transfer this agreement, and his rights and the moneys payable hereunder, to a third party, then the purchaser shall be precluded from in any manner attacking the validity of this agreement on the ground of fraud, duress, mistake, want of consideration or failure of consideration, or upon any other ground, and all moneys payable hereunder by the purchaser shall be paid to such assignee or holder without recoupment, set-off or counter-claim of any sort whatsoever.

It is distinctly understood and agreed that should said purchaser fail to make any of the said payments to said seller in the amounts, manner and within the time herein provided for, or should said purchaser fail to perform any of the terms or conditions hereof in the manner and within the time herein provided for, said seller may declare the entire purchase price and interest due and payable without notice or may take immediate possession of said automobile, attachments, accessories and equipment, and in the latter event all of the rights, titles and equities of said purchaser in and to said automobile shall immediately cease and determine, and said seller shall be released from all obligation to transfer or deliver said automobile to said purchaser, and all sums of moneys theretofore paid by said purchaser to said seller hereunder shall remain the sole property of said seller and shall be considered as compensation for the use of said automobile by said purchaser.

In the event said seller employs an attorney to recover possession of said automobile or to recover any indebtedness due hereunder or to enforce any of the terms of this agreement, the said purchaser hereby agrees to pay such reasonable attorney's fees as may be fixed by the court in that regard.

Time is of the essence of this agreement. This agreement and every term herein for the benefit of the seller shall inure to the benefit of, and operate in favor of the successors and assigns of the seller in the same manner.

IN WITNESS WHEREOF, the parties hereto have set their hands to this agreement, the day and year first above written, at SAN FRANCISCO CALIFORNIA

City or Town State

DE MARTINI MOTOR TRUCK CO. Inc.

By G. BRACCINI Title SALES MANAGER

Purchaser Sign Here

SELLER'S ASSIGNMENT AND GUARANTEE.

FOR VALUE RECEIVED, the undersigned does hereby sell, assign and transfer to

his, its or their right, title and interest in and to the within agreement, the property therein described and all moneys to become due hereunder and hereby guarantees that the purchaser will make prompt payment of all of said moneys and will fully perform each and every term thereof.

The undersigned hereby consents that.....
may extend the time within which payments may be made under said agreement, and that.....
provisions therein as it may determine. may waive the performance of such other terms and

DE MARTINI MOTOR TRUCK CO. Inc.

Dated:, 19.....

By, Title.....

Title.....

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI et al.,

Defendants.

**A swer to Petition of De Martini Motor Truck
Company in the Above-entitled Action.**

Comes now the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff, and Samuel F. Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of De Martini Motor Truck Company in the above-entitled action, denies and alleges as follows:

That he has no information or belief sufficient to enable him to answer the allegations in petitioner's petition herein, to wit, that the said petitioner had no knowledge or belief that the said truck, mentioned and described in petitioner's petition was intended to be used or used in the unlawful transportation of intoxicating liquor, and basing his denial upon that ground, denies that the said petitioner had no knowledge or information or suspicion that the defendant in the above-entitled action did not

intend to use or had used and was using said truck in the unlawful transportation of intoxicating liquor;

And further answering, respondent presents the facts and circumstances set out in the affidavit of Vaughn H. De Spain, Federal Prohibition Agent, which said affidavit is hereto attached, [8] made a part hereof, and marked Exhibit "A."

WHEREFORE respondent prays that the petition herein be denied.

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Respondent. [9]

Exhibit "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI et al.,
Defendants.

Affidavit of Vaughn H. De Spain.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Vaughn H. De Spain, being first duly sworn, de-

poses and says: That he is and at all of the times herein mentioned was in the employ of the Government of the United States as Federal Prohibition Agent, and acting as such under the direction of the Federal Prohibition Director of the State of California, to wit, Samuel F. Rutter.

That on the 6th day of October, 1922, affiant in company with other Federal Prohibition Agents, between the hours of four and five o'clock A. M. of said day, observed defendant Guiseppe Capacioli with a truck and loading the same at No. 525 Filbert Street in the City and County of San Francisco, State of California, with intoxicating liquor, to wit, seven barrels of red wine containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes; that after the said intoxicating liquor was loaded upon the truck mentioned and described in petitioner's petition herein, the said Guiseppe Capacioli, with other persons, started to and did drive away in said truck from said place where the said liquor was being loaded to near Filbert and Stockton Streets, in the said City and County, and affiant together [10] with other prohibition agents then and there caused the said automobile with the said liquor therein to be stopped, and then and there arrested the said Guiseppe Capacioli, who was the driver of said truck, together with the other persons who were then and there with him, to wit, A. Parma, F. Chifinti and F. Orlandi, and affiant and the other prohibition agents then and there seized the said truck and said wine, and which said truck and wine are now in the

possession of Samuel F. Rutter, as Federal Prohibition Director for the State of California; that the said Guiseppe Capacioli then and there stated to affiant and the other prohibition agents that the wine belonged to him and that he had hired the truck from one of the other defendants then and there present. That the said Guiseppe Capacioli had not, nor had any other of the defendants, any permit to authorize their possession or transportation of the said intoxicating liquor. Affiant, after the arrest and seizure aforesaid, made investigation respecting the ownership of said wine and ascertained that the said wine had been stolen by the said defendants from a winery, to wit, the place where the said wine was being loaded upon said truck, said winery being under seizure by the Internal Revenue Collector for the First Internal Revenue District of the State of California.

V. H. DE SPAIN.

Subscribed and sworn to before me this 27 day of Jan. 1923.

[Seal]

C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Feb. 19, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL et al.,

Defendants.

No. 12,957.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

Order Denying Motion (for Return of Truck).

PARTRIDGE, JOHN S. [12]

In each of the above-entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition law provides:

“Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile . . . and shall arrest any person in charge thereof. The courts upon conviction of the person so arrested, shall

order the liquor destroyed and, unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale . . . shall pay all liens according to the priority, which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor.” [13]

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Silvester*, 273 Fed. 253, allowed a lien for the amount of the unpaid purchase price under what the opinion calls “a conditional bill of sale,” although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit “a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law.”

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshal Montgomery et al.*, held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: “It is not unreasonable to suppose Congress had in mind the fact that an owner may determine who shall have

the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession."

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this state that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed, the loss falls upon him. *Potts Company vs. Benedict*, 156 Cal. 322; *Waltz vs. Silveria*, 25 Cal. App. 717. It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price: [14]

First, he can take back the property because the title is still in him;

Second, he can waive this right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Park & Lacey Company vs. White River Lumber Company*, 101 Cal. 37; *Holt Manufacturing Company vs. Ewing*, 109 Cal. 353; *Waltz vs. Silveria*, *supra*; *Muncy vs. Brain*, 158 Cal. 300; *Adams vs. Anthony*, 178 Cal. 158.

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States*, No. 3865, decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved was whether Section 3450 of the Revised Statutes had been repealed by the provisions of the

National Prohibition Act. It was clearly recognized that under Section 3450, the conveyance in which goods were moved in an attempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provisions of the Revised Statutes was in effect repealed by Section 26 of the National Prohibition Act. It is therefore apparent that unless language is found in Section 26 which would relieve the vendor under a conditional bill of sale from the provisions of forfeiture and sale, and those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable:
[15]

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated April 14, 1923.

[Endorsed]: Filed Apr. 14, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[16]

In the United States District Court for the Northern District of California.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

Petition for Appeal.

To the Honorable JOHN S. PARTRIDGE, District Judge.

The De Martini Motor Truck Company, petitioner herein, feeling aggrieved by the order and decree rendered and entered in the above-entitled cause on the 14th day of April, A. D. 1923, does hereby appeal from said order and decree to the Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said order and decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[17]

In the United States District Court for the Northern District of California.

No. 12,188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI,
Defendant.

Assignment of Errors.

Now comes the De Martini Motor Truck Company, petitioner herein, in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree and order made by this Honorable Court on the 14th day of April, 1923.

I.

That the United States District Court for the Northern District of California erred in refusing to render an order and decree pursuant to the pe-

tion of the De Martini Motor Truck Company, filed in the above cause applying for the return to it, the said De Martini Motor Truck Company, of a certain 2-ton truck in said petition described.

II.

That the United States District Court for the Northern District of California erred in refusing to decree that the De Martini Motor Truck Company have a lien, after deducting the cost of seizure and expenses of keeping and sale of the certain 2-ton truck, described in the petition of said De Martini Motor Truck Company filed herein, to the extent of Six Hundred Thirty-one [18] and 79/100 (\$631.79) Dollars.

III.

That the United States District Court for the Northern District of California erred in refusing to decree that the De Martini Motor Truck Company have a lien upon the proceeds of sale of the certain 2-ton truck described in the petition of the said De Martini Motor Truck Company filed herein.

P. R. LUND,

Solicitor and Counsel for Appellant.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[19]

In the United States District Court for the North-
ern District of California.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

Order Allowing Appeal.

On motion of P. R. Lund, Esq., solicitor and counsel for the De Martini Motor Truck Company, petitioner herein, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Ninth Judicial District from an order and decree heretofore filed and entered herein, be, and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals for the Ninth Judicial District. It is further ordered that the bond on appeal be fixed in the sum of \$500.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

JOHN S. PARTRIDGE,

Judge.

Dated this 24th day of April, 1923.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

In the United States District Court for the Northern District of California.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

Supersedeas Order.

This cause coming on to be heard the 24th day of April, 1923, upon the application of the appellant for an appeal to the Circuit Court of Appeals for the Ninth Judicial District and said appeal having been allowed, it is ordered that the same shall act as a supersedeas, the said appellant having executed bonds in the sum of \$500.00 as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the Northern District of California until the further order of this court.

JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[21]

In the United States District Court for the Northern District of California.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That the Globe Indemnity Company, a corporation, organized and existing under the laws of the State of New York, and licensed and authorized to conduct a bonding and surety business within and under the laws of the State of California is held, and firmly bound unto the United States of America in the full and just sum of \$500.00 to be paid to the said United States of America; to which payment well and truly to be made, the said Globe Indemnity Company hereby binds itself, its successors and assigns by these presents.

Signed, sealed and executed at San Francisco, California, this 26th day of April, A. D. 1923, on behalf of the Globe Indemnity Company by its attorney-in-fact, thereunto duly authorized.

Whereas, lately at a District Court of the United States for the Northern District of California in the above-entitled cause depending in said Court, an order and decree was rendered against De

Martini Motor Truck Company, petitioner, in intervention in said action, and the said De Martini Motor Truck Company having obtained from said Court, an appeal to reverse the order [22] and decree in the aforesaid intervention and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said De Martini Motor Truck Company shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GLOBE INDEMNITY COMPANY.

(Signed) J. S. ELLIOTT, (Seal)

Attorney-in-fact.

J. S. ELLIOTT.

Form of bond and sufficiency of sureties approved.

JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[23]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 23 pages, numbered from 1 to 23, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of United States of America, vs. Giuseppe Capaccioli et al. De Martini Motor Truck Co. (Claimant of Truck), No. 12,188, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praeceptum for transcript on appeal (copy of which is embodied herein) and the instructions of the Attorney for Claimant and Appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Eight Dollars and Seventy-five Cents (\$8.75), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of May, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,
Deputy Clerk. [24]

(Citation on Appeal.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to UNITED STATES OF AMERICA and to the Honorable JOHN T. WILLIAMS, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein United States of America is plaintiff and Guiseppe Capacioli is defendant and petitioner in intervention De Martini Motor Truck Company, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 26th day of April, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: No. 12,188. United States District Court for the Northern District of California. De

Martini Motor Truck Company (a Corporation),
Appellant, vs. United States of America. Citation
on Appeal. Filed Apr. 26, 1923. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[25]

{Endorsed}: No. 4026. United States Circuit
Court of Appeals for the Ninth Circuit. De Mar-
tini Motor Truck Company, Appellant, vs. United
States of America, Appellee. Transcript of Rec-
ord. Upon Appeal from the Southern Division of
the United States District Court for the Northern
District of California, First Division.

Filed May 8, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

